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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 158

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, and GRIFF DAVIS, individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, and W. J. WEIL, individually and in behalf of all members of the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—against—

JOHN P. O'CONNELL, R. A. GALLO, and CHARLES DOYLE, individually and in behalf of all members of the SWITCHMEN'S UNION, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association, and WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON, and JOHN A. BISH, individually and in behalf of all members of the ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association;

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ..... Misc.

BROTHERHOOD OF RAILROAD TRAINMEN, an unincorporated association, and GRIFF DAVIS, individually and as General Chairman of the BROTHERHOOD OF RAILROAD TRAINMEN, and W. J. WEIL, individually and in behalf of all members of the BROTHERHOOD OF RAILROAD TRAINMEN,

Petitioners,

—against—

JOHN P. O'CONNELL, R. A. GALLO, and CHARLES DOYLE, individually and in behalf of all members of the SWITCHMEN'S UNION, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and SWITCHMEN'S UNION OF NORTH AMERICA, AFL-CIO, an unincorporated association, and WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON, and JOHN A. BISH, individually and in behalf of all members of the ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, who are employed by the ERIE LACKAWANNA RAILROAD COMPANY, and ORDER OF RAILWAY CONDUCTORS AND BRAKEMEN, an unincorporated association,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Brotherhood of Railroad Trainmen, an unincorporated association, and Griff Davis, individually and as

General Chairman of the Brotherhood of Railroad Trainmen, and W. J. Weil, individually and in behalf of all members of the Brotherhood of Railroad Trainmen, Petitioners, pray that a Writ of Certiorari issue to review the judgment and order of the United States Court of Appeals for the Second Circuit affirming a judgment in favor of the Respondents entered on March 5, 1968.

Opinions Below

On April 27, 1967, the Petitioners were temporarily enjoined by the United States District Court for the Southern District of New York (Herlands, J.) from enforcing the terms of a union security agreement entered into between the Petitioners and the Erie Lackawanna Railroad (268 F. Supp. 397) [Appendix "A" *infra*].

The United States District Court for the Southern District of New York granted Respondents' motions for summary judgment, denied Petitioners' cross-motions for summary judgment, and entered judgment for Respondents on Petitioners' counterclaim. The opinion of Judge Palmieri is dated July 25, 1967 [Appendix "B" *infra*], and judgment was entered thereon in the office of the Clerk of the United States District Court for the Southern District of New York on the 29th day of August, 1967.

On March 5, 1968 the United States Court of Appeals for the Second Circuit unanimously affirmed the judgment of the United States District Court (391 F.2d 156) [Appendix "C" *infra*].

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254. The jurisdiction of the lower Court was based upon 28 U.S.C. 1337 and the Declaratory Judgment Act, 28 U.S.C. 2201.

Question Presented

1. Whether train service employees may be required by a labor-management agreement to financially support a collective bargaining agent bearing the exclusive duty to represent said employees in all prospective crafts of train service?

Statutes Involved

Section 2, Eleventh of the Railway Labor Act (45 U.S.C. 152 Eleventh) [Appendix "D" *infra*].

Statement of the Case

Representing, for all practical purposes, all train service employees of the Erie Lackawanna Railroad, the Petitioners negotiated and executed agreements with the Erie Lackawanna Railroad which, pursuant to Section 2, Eleventh (a) (45 U.S.C. 152 Eleventh (a)) of the Railway Labor Act, required employees to become members of the Brotherhood. While all statutory safeguards mandated in order to prevent discrimination were included in the union security agreements, the parties omitted to include a provision which would give the option to employees to satisfy their union shop obligation by paying dues to any other union.

The omission was based on the teaching of this Court in *Pennsylvania R. Co.* v. *Rychlik*, 352 U.S. 480, 492 to 494, which gave the rationale for permitting alternative union shop membership to operating railroad employees, and the decision of the United States Court of Appeals for the Third Circuit, through which the railroad operates, in *Rohrer* v. *Conemaugh & Black Lick R.R. Co.*, 359 F.2d 127 (1966).

The dicta in the *Rychlik* case and the holding in the *Rohrer* case were to the effect that the sole purpose of subdivision (c) of Section 2, Eleventh of the Railway Labor Act[1] was to prevent the imposition of compulsory dual unionism on operating employees who are traditionally exposed to seasonal intercraft transfers. Since, as in the *Rohrer* case, it was manifest that none of the employees could be involved in intercraft transfers, the legislative *raison d'etre* for the inclusion of the subdivision (c)[1] license was absent. The parties therefore omitted to furnish a contractual license to support a stranger to collective bargaining on the Erie Lackawanna Railroad in lieu of the agent charged with obligations to bargain on behalf of all the employees. (*Steele* v. *L. & N. R.R. Co.*, 323 U.S. 192; *Turnstall* v. *Brotherhood of Locomotive Firemen & Enginemen*, 323 U.S. 210; *Brotherhood of Sleeping Car Porters* v. *Thompson*, 367 F.2d 489 [4th Cir.]).

The Respondents are employees of the Erie Lackawanna Railroad who successfully insisted below that subdivision (c) of Section 2, Eleventh[1] conferred upon them a right to satisfy their union shop obligation by paying dues to a rival organization. They successfully insisted that any union security agreement must spell out *in haec verba* the alleged right not to belong to or support the union which renders them service as collective bargaining agent.

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[1] 45 U.S.C. 152, Eleventh (c).

Reasons for Granting the Writ

The decision and opinions in this case are in direct conflict with the decision and opinion of the Court of Appeals for the Third Circuit in *Rohrer* v. *Conemaugh & Black Lick R.R. Co.*, 359 F.2d 127. The Court of Appeals in the Seventh Circuit, in *Birkholz, et al.* v. *Dirks, et al.*, 391 F.2d 289, has also held in substance that subdivision (c) of paragraph Eleventh of Section 2[1] is an inflexible mandate to incorporate the provision permitting alternative union shop membership in every union security agreement involving operating trainmen. A Petition for a Writ of Certiorari in the *Birkholz* case is being presented to this Court so that this question of vital concern to the railroad industry can be finally resolved.

The Court should also grant the Writ because the philosophy expressed by the interpretation is at war with a coherent national labor policy,[2] not only for industry generally, but for the balance of the railroad industry as well. The strict interpretation given Section Eleventh (c)[1] by the Court of Appeals in the Second and Seventh Circuits carved out one segment, indeed a critical segment, of the American economy for special adverse treatment. It substituted for the equitable concept of compelling financial support to the agent performing valuable services to employees, as expressed in *International Association of Machinists* v. *Street*, 367 U.S. 739, 760, 764 (1951), a logically and morally insupportable dogma. The dogma of amplifying the Railway Labor Act so as to insist on blindly including the language of subdivision (c) of paragraph Elev-

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[2] *National Woodworkers Association* v. *Labor Board*, 386 U.S. 612; *Local 1976, Carpenters Union* v. *Labor Board*, 357 U.S. 93, 99, 100; *N.L.R.B.* v. *Allis Chalmers Manufacturing Co., Inc.*, 388 U.S. 175.

enth, Section 2,[1] in all agreements means that carriers must always afford competing unions in the operating sector of the railroad industry the opportunity to usurp the role of collective bargaining agent. The Federal Government therefore underwrites instability in labor-management relations as a matter of national policy in a critical sector of the economy. This strict interpretation therefore tends to conflict with the general purposes of the Railway Labor Act. (45 U.S.C. 151a (1), (4) (5); *Brotherhood of Railroad Trainmen* v. *Chicago R. & I. R. Co.*, 353 U.S. 30, 40.)

Grossly stated, the legislative history of the 1951 Amendment[3] demonstrates an intention to grant the privilege of the union shop, which had been found to be effective and salutary in industry generally, to the railroad industry. It was only to meet a special operational characteristic idiosyncratic to Engineers and Firemen and to Conductors and Brakemen, that any deviation from the remedial purpose of authorizing union shops was even considered by Congress. Eleventh (c)[1] represented the solution of a pragmatic problem. Eleventh (c)[1] never was intended to express a philosophical rejection of the union shop authorization or to provide a legislative basis to deny the benefits of the strict union shop in those situations where the operational idiosyncracy did not and could not exist.

The operational idiosyncracy is that there is from time to time a changing of an employee from one craft to another on a seasonal basis, after which he returns to his

[3] Report No. 2262, 81st Cong., 2nd Sess.; Report No. 2811, 81st Cong., 2nd Sess.; Hearings before the Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess., on S. 3295; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess., on H.R. 7789; 96 Congressional Record 15736, 16261, 16268, 16328, 17055.

craft. The legislative history demonstrates a behind-the-scenes search for a formula that would permit intercraft transfers, where the need existed, without imposing on the employees thus involved the obligations of supporting two collective bargaining agents. The formula selected was intended to permit *only* those categories of employees involved in the problems of intercraft transfers to satisfy their union membership requirement by belonging to any union organized under the Railway Labor Act which was national in scope.

Implicit though unexpressed was the understanding that the purpose of permitting such alternative union membership was to permit freedom for the intercraft transfer. (*Rychlik, supra*). Nowhere in the legislative history can there be found any suggestion of an intent to confirm competitive unionism as an instrument of national labor policy.

When a union, such as the Brotherhood of Railroad Trainmen, one of the Petitioners herein, is authorized to contract for all of the train service employees on a particular railroad so that men may readily transfer from craft to craft without being exposed to any need to join another union, the pragmatic reason for incorporating the alternative union shop license is absent. If there is no useful purpose to be served by incorporating the language of Eleventh (c)[1] in the union security agreement, and if there is no *bona fide* philosophical or policy reason for incorporating such language in the agreement, the parties to a collective bargaining agreement should be free to enter into a strict union shop contract just as all other unions can do in the railroad industry and in industry generally.

Obviously, a union without responsibilities is free to charge cut rate dues and it is free to conduct the role of the spoiler in union-management relations. Hence it be-

comes virtually impossible to achieve long range stabilization of labor-management relations when financial support for dissident unionism is underwritten by a statutory interpretation.

Petitioners insist that the 1951 Amendment means that authorizations for union shop agreements were envisioned for the railroad industry on an individual carrier basis; that is, that *a* railroad would agree with *a* union that *a* collective bargaining agreement could include a union security clause. That union security clause must, of necessity, include the language of Section 2, Eleventh (c)[1] if its crafts of operating train service employees are represented by more than one union as an authorized collective bargaining agent. On those railroads, however, where the union is an industrial union as on the Conemaugh & Black Lick Railroad in *Rohrer, supra,* and in those situations where the union is a virtual industrial union for all train service employees, as is the case on the Erie Lackawanna Railroad, Congress did not intend that the language of subdivision (c)[1] be required.

WHEREFORE, Petitioners respectfully pray that a Writ of Certiorari issue to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

ARNOLD B. ELKIND
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New York, N. Y. 10017

Proof of Service

I, ARNOLD B. ELKIND, Attorney for Petitioners and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day I served a copy of the foregoing Petition for Writ of Certiorari on Lee Leibik and Ruth Weyand, Attorneys for Respondents, by mailing a copy thereof, postage pre-paid, addressed to their office at 343 South Dearborn Street, Chicago, Illinois 60604.

Dated this 3rd day of June, 1968.

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APPENDICES

APPENDIX "A"

(R. 131-154)

Opinion by Herlands, D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

APPEARANCES:

STURM & PERL, ESQS., (New York)
ALAN F. PERL, *of Counsel*

—and—

LEE LEIBIK and RUTH WEYAND, ESQS., (Chicago)
LEE LEIBIK and RUTH WEYAND, *of Counsel,*
Attorneys for Plaintiffs.

RAYMOND H. BRANDA, ESQ., (New York)
Attorney for Defendant Erie Lackawanna RR Co.

ARNOLD B. ELKIND, ESQ., (New York)
Attorney for Defendants Brotherhood of Railroad Trainmen and W. J. Weil, individually.

HERLANDS, *District Judge:*

The instant motion for a preliminary injunction, brought on by an order to show cause, raises important questions as to the proper interpretation of the 1951 amendments to the Railway Labor Act. Plaintiffs are three yard service employees of the defendant Erie Lackawanna Railroad Company (hereinafter referred to as the Erie), who sue

individually and on behalf of all members of the Switchmen's Union of North America, AFL-CIO, (hereinafter referred to as the Switchmen's Union) employed by the defendant railroad. The Switchmen's Union is also a party plaintiff. The defendants are the Erie, the Brotherhood of Railroad Trainmen (hereinafter referred to as the Brotherhood), and two officers of the Brotherhood who are sued in their individual and representative capacities.

According to the verified complaint, the Delaware, Lackawanna & Western R.R. Co. and the Erie Railroad merged in October, 1960, to form the defendant railroad. For many years prior to the merger the Switchmen's Union had been the duly designated and recognized representative of the craft or class of yard foremen, helpers and switch tenders (hereinafter referred to as yard service employees) of the Delaware, Lackawanna & Western R.R. Co., while the Brotherhood similarly represented the yard service employees of the Erie Railroad.

In March, 1964, the National Mediation Board conducted an election among all of the yard service employees of the merged railroad. The Brotherhood received 43 more votes than the Switchmen's Union, and was designated as their representative. Until March, 1967, the collective bargaining agreement between the Brotherhood and the Erie, like the pre-merger agreements of both the Switchmen's Union and the Brotherhood, contained a union shop clause which was expressly qualified by the language of Section 2, Eleventh (c) of the Railway Labor Act. Under this agreement, more than 500 yard service employees of the Erie maintained membership in the Switchmen's Union without joining the Brotherhood.

Opinion by Herlands, D.J.

On March 14, 1967, the Brotherhood and the Erie entered into a new collective bargaining agreement, effective immediately, which provided that, as a condition of continued employment, all yard service employees in the New York Terminal Yards of the Erie "shall become and remain members" of the Brotherhood. No alternative membership clause was included in the union shop provision.

The essence of plaintiffs' claim is that this strict union shop agreement violates the Railway Labor Act in that it fails to provide—in accordance with Section 2, Eleventh (c) (45 U.S.C. § 152 Eleventh (c))—that the requirement of union membership shall be satisfied if an employee maintains membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act, and admitting to membership employees in any of the services or capacities covered by the First Division of the National Railroad Adjustment Board.

The complaint further alleges that the Brotherhood and the Erie "have threatened and are threatening" to discharge the individual plaintiffs and all other members of the Switchmen's Union employed by the Erie, unless they end their membership in the Switchmen's Union and become and remain members of the Brotherhood.

Each of the plaintiffs and the members of the class they represent have seniority rights and other employment benefits which would be lost in the event of a discharge for failure to join the Brotherhood as required by the new agreement. On the other hand, valuable insurance rights would be lost if they failed to continue membership in the Switchmen's Union. Yet, the constitution of the Brotherhood bars dual membership in a union, such as the Switch-

men's Union, which is seeking representation rights on behalf of the same class of employees on the same railroad. Even if they are not discharged for maintaining membership in the Switchmen's Union, they could not afford to pay fees and dues to two unions.

On the basis of these factual allegations, plaintiffs contend that their rights—protected under Section 2 of the Railway Labor Act—are being infringed, and that the defendants have caused and are threatening to cause irreparable injury to the plaintiff employees for which no remedy in money damages is available. They pray for a preliminary and permanent injunction restraining the defendants from "discharging or threatening to discharge, or attempting to cause the discharge" of any employee who fails to join the Brotherhood, so long as he maintains membership in the Switchmen's Union. They also seek a judgment declaring the union shop agreement null and void. Finally, plaintiff Switchmen's Union asks for money damages in the sum of 100,000. dollars.

The Brotherhood's verified answer admits that Exhibit A annexed to the complaint is a true copy of the collective bargaining agreement entered into between the Brotherhood and the Erie, but denies its illegality and denies substantially all of the other allegations of the complaint. Of immediate significance on this motion is defendant Brotherhood's denial that this Court has jurisdiction to construe the collective bargaining agreement, because Congress has vested exclusion jurisdiction over such disputes in the National Railroad Adjustment Board, and to system, group or regional Boards of Adjustment. The Brotherhood further denies that this Court has jurisdiction to determine the legality of the agreement under the Railway

Labor Act until the plaintiff employees have exhausted the procedures of the contract. The Brotherhood's verified answer also contains a counterclaim for libel.

The question of jurisdiction may be disposed of summarily. Plaintiffs invoke the power of this Court under 28 U.S.C. § 1337 conferring original jurisdiction upon this court of civil actions arising under any Act of Congress regulating Commerce, and under 28 U.S.C. § 2201, creating the remedy of declaratory judgments.

While the National Railroad Adjustment Board has exclusive and primary jurisdiction over disputes concerning the meaning of collective bargaining agreements in the railroad industry (*Slocum* v. *Delaware, Lackawanna & Western R.R. Co.*), 339 U.S. 239 (1950), and the instant agreement expressly provides its own procedure in cases of non-compliance with its provisions, it is well settled that the federal district courts have jurisdiction to grant injunctive and declaratory relief when the legality of such an agreement under the Railway Labor Act is called in question. See, e.g., *Brotherhood of Railroad Trainmen* v. *Howard*, 343 U.S. 768, 774 (1952); *Graham* v. *Brotherhood of Locomotive Firemen & Engineers*, 338 U.S. 232, 239 (1949); *Tunstall* v. *Brotherhood of Locomotive Firemen & Engineers*, 323 U.S. 210, 212-213 (1944); *Switchmen's Union of North America* v. *Southern Pacific Co.*, 253 F.2d 81 (9th Cir.), cert. denied, 358 U.S. 818 (1958).

The present action is governed by the principles expounded by the above decisions. There is here no question as to the proper construction of a collective bargaining agreement or its proper application to specific employees; rather, the issue posed is a straightforward question of statutory interpretation.

The Brotherhood frankly conceded upon oral argument —as it was obviously compelled to do—that the union shop clause[1] of the new collective agreement would violate Section 2, Eleventh (c) of the Railway Labor Act if the latter were construed literally. The Brotherhood contends, however, that the legislative history of the provision in question, and the decisions construing it, unmistakably demonstrate the legality of the disputed agreement in the circumstances here prevailing.

Resolution of the issue posed necessarily depends upon an understanding of the purpose underlying Section 2, Eleventh (c) and the specific means chosen by Congress to effectuate that purpose.

Until 1951, union shop agreements were outlawed in the railroad industry. The prohibition had been added to the Railway Labor Act in 1934 at the behest of the unions themselves because such agreements had been used by the

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[1] The union shop clause of the collective bargaining agreement between the Brotherhood and the Erie reads as follows:

"1. It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards including Paterson, N.J., Newark, N.J. and Dundee, N.J., Port Jervis, N.Y., Middletown, N.Y., Newburg, N.Y., Syracuse, N.Y., Utica, N.Y., and Scranton, Pa., represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood: Provided, that this agreement shall not require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership has been denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Brotherhood of Railroad Trainmen."

railroads to perpetuate company unions. This problem having become dissipated with time, Congress amended the Act in 1951 to permit negotiation of union shop agreements. Section 2, Eleventh (a) (45 U.S.C. § 152 Eleventh (a)).

The provision enacted substantially parallels the law applicable to industry in general under the National Labor Relations Act. (29 U.S.C. §§ 157, 158). Its essential purpose is to permit unions—through agreements with employers—to compel the entire membership of the class of employees represented to bear an equitable portion of the cost of such representation. During the hearings leading to the 1951 amendments, however, the unions called attention to a problem—peculiar to the operating trades in the railroad industry—which would result from introduction of the union shop.

As described by the *Supreme Court in Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480 (1952):

> "Labor in this industry is organized largely on craft rather than industrial lines. Engineers, firemen, trainmen, switchmen, brakemen and conductors, for example, each are separately organized for the purposes of bargaining. And normally different unions represent different crafts; thus, on the same railroad, firemen might be represented by the Brotherhood of Firemen and Enginemen, and engineers by the Brotherhood of Locomotive Engineers. Yet seasonal and other factors produce a high degree of job mobility for individual employees in the industry, that is, of shuttling back and forth between crafts. For example, a fireman may be temporarily promoted to engineer for a short time or a conductor might have to serve temporarily as

brakeman. Under the ordinary union shop contract, such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—one representing each of his crafts—or would have to shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean loss of seniority and union benefits." (352 U.S. at 490)

The legislative representative of the defendant Brotherhood proposed an amendment to the bill at the House and Senate committee hearings, which was aimed at accommodating the needs of employees subject to the problem of intercraft mobility. The proposed amendment read as follows:

"provided that when two or more such crafts or classes are closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, which is the duly designated or recognized craft or class representative of any one of them."

(Hearings before a Subcommittee of the Committee on Labor and Public Welfare, United States Senate, 81st Cong., 2nd Sess. on S. 3295, p. 69; Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives, 81st Cong., 2nd Sess. On H.R. 7789, pp. 32-33.)

On the other hand, the spokesman for the Railway Labor Executives Association—representing twenty one major railway unions including three of the five major unions in the operating trades[2]—urged that the problem of intercraft mobility be left to collective bargaining.

The bill permitting union shop agreements was reported to the Senate without amendment, but the Committee offered an amendment on the Senate floor which read:

> "*Provided further*, that no such (union shop) agreement *shall require membership in more than one labor organization.*" 1950 Cong. Rec., p. 15735

When the Senate again considered the bill after a temporary adjournment, a substitute amendment—drafted at a conference of the railroad labor organizations—was offered[3] and approved. That amendment forms the present Section 2, Eleventh (c), the provision here in controversy. It reads as follows:

> "(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train,

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[2] The three unions are the Switchmen's Union, the Brotherhood of Firemen and Enginemen and the Order of Railway Conductors. The remaining two major unions are the defendant Brotherhood—which had submitted its own proposed amendment—and the Brotherhood of Locomotive Engineers—which had opposed any and all legislation permitting union shop agreements.

These five unions are the only ones represented by members of the First Division of the National Railroad Adjustment Board.

[3] Senator Hill, in explaining the substitute amendment after he had offered it on the floor of the Senate, stated that: "the only purpose of the amendment is to make sure that a person employed by one of the railroads does not have to belong to more than one union." 1950 Cong. Rec. p. 16268.

yard, or hostling service, that is an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

Opinion by Herlands, D.J.

I. PLAINTIFFS' PROBABILITY OF SUCCESS

It is the Brotherhood's contention that the explicit language of Section 2, Eleventh (c) is inapplicable here, because "the 'narrow problem of intercraft mobility' does not exist with respect to the employees covered by this contract." The reason given is that "all involved crafts on the railroad are represented by the Brotherhood of Railroad Trainmen and there can be no problem of compulsory dual membership." (Defendant Brotherhood's Memorandum of Law, p. 9.) Correlatively, the Brotherhood argues that, since the Switchmen's Union does not presently serve as authorized bargaining representative for any of the Erie's employees, the plaintiffs here cannot invoke the protection of Section 2, Eleventh (c).

In effect, the Brotherhood is asking for a construction of the statute which conforms to the explicit language of the proposed amendment which the Brotherhood submitted to House and Senate committees during the 1950 hearings on the legislation. That construction would permit an employee—in lieu of joining the labor organization having the union shop agreement—to maintain membership in a labor organization "which is the duly designated or recognized . . . representative of any one of [the crafts or classes in which the employee has employment rights]." Hearings, *supra*. (Emphasis added.)

The recited legislative history demonstrates, however, that the Brotherhood's proposed amendment was not adopted by either of the legislative committees. Rather, the amendment offered and accepted on the floor of the Senate —which forms the present Section 2, Eleventh (c)—was

drafted collectively by the unions themselves.[4] The detailed language of the provision delineates the explicit means for dealing with the problem of intercraft mobility which was chosen by the unions and adopted by Congress.

In the face of this history, it would be a usurpation of the legislative function for this Court to assert that the language does not mean what it says, or that the problem of intercraft mobility ought to be handled by some other approach. While the plain meaning rule is not well regarded in this Circuit,[5] and has very recently been criticized by the Supreme Court in construing labor legislation,[6] the specificity of this particular provision and its legislative history leave little interpretative flexibility.

Most significantly, moreover, we have no reason to doubt that the explicit means delineated by Section 2, Eleventh (c) is the soundest approach to the problem of intercraft mobility.

The Brotherhood argues that Section 2, Eleventh (c) should not be construed to bar strict union shop provisions when the particular factual circumstances do not involve the problem of intercraft mobility. How—as a practical matter—would such a construction of the statute be implemented?

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[4] Until very recently, both the plaintiff Switchmen's Union and the defendant Brotherhood, among others, have expressly conditioned their union shop agreements by the literal terms of Section 2, Eleventh (c). *Cf. NLRB* v. *Drivers Local Union*, 362 U.S. 274, 290 (1960); *United States* v. *American Trucking Ass'ns, Inc.*, 310 U.S. 534, 549 (1940).

[5] See, *e.g.*, *Federal Maritime Commission* v. *DeSmedt*, 366 F.2d 464, 469-70 (2d Cir. 1966); *Monarch Life Ins. Co.* v. *Loyal Protective Life Ins. Co.*, 326 F.2d 841, 845 (2d Cir. 1963); *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

[6] *National Woodwork Mfrs. Ass'n* v. *NLRB*, —— U.S. ——, —— (April 17, 1967) (Slip opinion pp. 5-6).

On each occasion that a strict union shop agreement is executed, the employees who are members of a minority union would be faced with the dilemma with which the instant plaintiffs are confronted. As here, the question of the validity of the agreement inevitably would find its way into the federal courts for an ad hoc adjudication.

But what evidence should be admitted, and what standards should the Court employ in determining the quality and magnitude of the problem of intercraft mobility in a particular situation? Is the Court to make a subjective evaluation of the relatedness of various crafts, the mobility of individual employees, the likelihood of a change in the bargaining representative resulting from shifts in the level of employment, etc.?

While the Brotherhood asserts that a possible standard could be whether the minority union is the designated or recognized representative of any related class or craft, the legislative history indicates that this approach was explicitly suggested to the Congressional committees by the Brotherhood but not adopted by them. It may well be that the railroad unions who drafted this provision collectively, and Congress in adopting their proposal, had chosen the specific approach delineated in Section 2, Eleventh (c)—recognizing that bargaining representatives may change with shifts in the level of employment as employees shuttle between crafts—so as not to upset the balance of union power which existed under the prevalent practice of having substantial enclaves of minority union members existing in the jurisdiction represented by the majority union.

In any event, whatever may be the advantages or disadvantages of other approaches to the problem of intercraft mobility, the means provided by the literal terms of Section 2, Eleventh (c) accommodates the needs of the employees

in the operating crafts without promoting internal warfare between unions. Moreover, the provision—literally construed—reconciles the problem of intercraft mobility with the primary policy underlying the 1951 amendments to allow for an equitable sharing of the cost of representation. For, by limiting alternative membership to those unions which qualify as electors to the First Division of the National Railroad Adjustment Board,[7] membership may be confined to those unions which share the costs of administration of the NRAB, and join together in other respects in negotiating and policing collective bargaining agreements.[8]

Absent specific direction by Congress, it would be most imprudent for the federal courts to reach out to create another approach to the problem of intercraft mobility, and thereby assume the role of referee in interunion power struggles. *Cf., Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480, 496 (1957).

Rychlik and Rohrer

The Brotherhood purports to find conclusive support for its position here in two decisions construing the controversial provision of law. While broad language in both opinions lends some support to the Brotherhood's argument, neither case squarely raised the issue presently before this Court.

In *Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480 (1957), an operating employee of the railroad had been discharged

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[7] See n. 2, *supra*.

[8] See Plaintiffs' Memorandum of Law, pp. 18-19; Brief for Petitioner Brotherhood of Railroad Trainmen, p. 30; *Pennsylvania R.R. Co.* v. *Rychlik*, 352 U.S. 480 (1957).

after resigning from the Brotherhood and contemporaneously joining the United Railroad Operating Crafts, a union which he "believed in good faith to be 'national in scope' and 'organized in accordance with' the Act," although it had never qualified as an elector to the First Division of the National Railroad Adjustment Board. The union shop provision of the Brotherhood's collective bargaining agreement was expressly conditioned by the precise language of Section 2, Eleventh (c).

Tracing much of the legislative history, the Court observed that the purpose of Congress was not "to give employees in the railroad industry any blanket right to join unions other than the authorized bargaining representative, or to help dissident or rising new unions to recruit new members" (352 U.S. at 488-89); rather, the very narrow purpose was "to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts." (352 U.S. at 492.)

Inquiring, then, into the "manner in which Congress achieved this purpose," the Court concluded that Section 2, Eleventh (c) did not permit alternative membership in merely "'any' labor organization which was national in scope and organized in accordance with the Act," but only in "such unions as have already qualified as electors to the First Division of the National Railroad Adjustment Board" under Section 3 of the Act. 352 U.S. at 495-96.

While the Brotherhood quotes various passages from the *Rychlik* opinion in support of its present contentions, it is clear that the explicit holding of the decision is not apposite. Moreover, one may—with equal facility—draw inferences from *Rychlik* which are contrary to the Brotherhood's position here.

The other decision relied upon by the Brotherhood is *Rohrer* v. *Conemaugh & Black Lick R.R. Co.*, 359 F.2d 127 (3d Cir. 1966). There, the Brotherhood sat on the other side of the fence, inasmuch as the plaintiff—an employee of the defendant railroad—had been discharged after changing membership from the United Steelworkers of America to the Brotherhood. The Steelworkers union was the designated representative for all crafts and classes of employees on the defendant railroad, a subsidiary of the Bethlehem Steel Corporation—as it was on all other Bethlehem railroad subsidiaries. Its collective bargaining agreement with the defendant railroad contained a strict union shop clause.

Relying upon language in *Rychlik*, the Court of Appeals held that Section 2, Eleventh (c) was inapplicable to the factual situation presented because the plaintiff was "not faced with the dilemma of intercraft mobility." (359 F.2d at 130.) That factual situation, however, is clearly distinguishable from the one now before this Court. Although certification by the National Mediation Board on the Conemaugh & Black Lick R.R.—as on all railroads—is by craft or class, the Steelworkers union in fact represented "all the employees of the Railroad without regard to craft or class delineations." (359 F.2d at 130.) Indeed, the Steelworkers union has been certified as the representative of all employees since 1947, is not a railroad craft union but an industrial union, and has never qualified as an elector to the First Division—or any other division—of the National Railroad Adjustment Board.

Rohrer, therefore, presents a special situation which properly should be limited to its particular facts. To the extent that the decision is persuasive of the Brotherhood's

contentions in the instant litigation, the Court is of the opinion that it should not be followed.

II. Plaintiffs' Irreparable Injury

Plaintiffs having made the "clear showing of probable success"[9] cited by decisions of this Circuit as a prerequisite for the granting of a preliminary injunction, we turn to an examination of those other desiderata which a district court is compelled to evaluate in exercising its sound discretion.[10] In the particular circumstances of this case, primary emphasis must lie with the need to preserve the status quo pending a final determination on the merits.

Here, the individual plaintiffs—and the members of the class they represent—have been caught in the crossfire of an interunion dispute which has been brought to a head by the recently executed union shop agreement. Unless enforcement of the strict union shop clause is temporarily suspended, these employees shortly[11] will be required to choose a course of conduct which may have a crucial and irreversible effect upon their seniority rights, insurance coverage, and other employment benefits. It is neither fair

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[9] *Ames* v. *Associated Musicians*, 359 F.2d 777, 779 (2d Cir. 1966), quoting from *Societe Comptoir De L'Industrie* v. *Alexander's Dep't Store*, 299 F.2d 33, 35 (2d Cir. 1962). The Court of Appeals has stated recently that the "burden is less where the balance of hardships tips decidedly toward the party requesting the temporary relief." *Dino de Laurentiis Cinematografica, S.p.A.* v. *D-150, Inc.*, 366 F.2d 373, 375 (2d Cir. 1966). *Accord, Unicon Management Corp.* v. *Koppers Co.*, 366 F.2d 199, 204-05 (2d Cir. 1966).

[10] *Santos* v. *Bonanno*, 369 F.2d 369, 370 (2d Cir. 1966); *Huber Baking Co.* v. *Stroehmann Bros. Co.*, 208 F.2d 464, 467 (2d Cir. 1953).

[11] Indeed, while this motion was *sub judice*, the Brotherhood notified employees who were not members of the Brotherhood that they would be cited for non-compliance with the union shop agreement if they failed to make application for membership in the Brotherhood by April 30, 1967.

nor necessary to require these employees to make such a vital decision while their right to maintain membership in the Switchmen's Union alone is being adjudicated. This is particularly so, where the plaintiffs' ultimate rights and remedies may vary markedly according to the course of conduct chosen in the interim. Even if the plaintiffs are eventually successful, their remedy at law may have been rendered wholly inadequate by the course they might choose to protect themselves now.

In sharp contrast, the Brotherhood can show little in the way of potential injury if the defendants are restrained from enforcing the union shop agreement against members of the Switchmen's Union, until the agreement's legality under the Railway Labor Act has been adjudicated. Since the enactment of the 1951 amendments, the Brotherhood has represented crafts and classes of employees on the defendant railroad under union shop provisions explicitly limited by the express language of Section 2, Eleventh (c). No claim has been made on behalf of the Brotherhood that the situation suddenly has become critical, and the Court perceives no precipative circumstance.

Thus, when the present and potential injury to the plaintiffs is weighed against the present and potential injury to the defendants, the balance of convenience inclines heavily on the side of the plaintiffs.[12]

The defendants, singularly and collectively, and their officers, servants and representatives are hereby restrained —pending a final determination of this action—from discharging, or threatening to discharge, or attempting to cause the discharge of the plaintiffs or any other employee of the defendant railroad for failure to join or maintain

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[12] *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F.2d 303, 310 (2d Cir. 1966).

membership in the defendant Brotherhood of Railroad Trainmen so long as he maintains membership in the plaintiff Switchmen's Union of North America.

This opinion constitutes the findings of fact and conclusions of law required under Rules 52 and 65 of the Federal Rules of Civil Procedure.

So ordered.

Dated: New York, N.Y.
April 27, 1967.

WILLIAM B. HERLANDS
U.S.D.J.

APPENDIX "B"

(R. 1225-1234)

Opinion by Palmieri, D.J.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Appearances

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Opinion by Palmieri, D.J.

PALMIERI, *J.*

These are cross-motions for summary judgment in an action seeking damages, injunctive relief and a declaratory judgment. The relevant facts are not in dispute.

The dispute is essentially one between railway unions and raises as its central issue the validity of a union shop agreement entered into on March 14, 1967, between the defendant railroad and the Brotherhood of Railroad Trainmen (Brotherhood). The agreement requires all employees covered by it to join and maintain membership in the Brotherhood of Railroad Trainmen.[1] It does not provide, in accordance with the requirements of Section 2, Eleventh (c) of the Railway Labor Act,[2] that alternate membership

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[1] "It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards including Paterson, N.J., Newark, N.J. and Dundee, N.J., Port Jervis, N.Y., Middletown, N.Y., Newburg, N.Y., Syracuse, N.Y., Utica, N.Y., and Scranton, Pa., represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood...."

[2] The pertinent statutory provisions are in Section 2, Eleventh (a) and (c) and read as follows (45 U.S.C. 152, Eleventh):

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute of law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class; • • •

• • •

in any other union national in scope and admitting yard service employees to membership satisfies the union shop agreement.

All the unions involved are admittedly national in scope, organized in accordance with the Railway Labor Act and admit to membership crafts or classes of yard service employees within the meaning of Section 2, Eleventh (c) of the Railway Labor Act.

The plaintiffs and intervenor plaintiffs are the Switchmen's Union and the Order of Railway Conductors and their members.

Under date of April 27, 1967, in a well documented opinion, Judge Herlands of this Court granted a preliminary injunction enjoining the defendants from discharging, or threatening to discharge or attempting to cause the dis-

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"(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-paragraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of Subsection (h) of Section 153 of this chapter, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employees, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him. *Provided, further*, that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

charge of the plaintiffs, or any other employees of the defendant railroad for failure to join or maintain membership in the defendant Brotherhood so long as he maintains membership in the plaintiff Switchmen's Union of North America. In granting threshold injunctive relief it was the Court's decision that the union shop agreement between the Brotherhood and the Erie violated the Railway Labor Act in that it failed to provide, in accordance with Section 2, Eleventh (c) of that act (45 U.S.C. § 152, Eleventh (c)) (*supra,* footnote 2), that the requirement of union membership shall be satisfied if an employee maintains membership in any one of the labor organizations, national in scope, organized in accordance with the Railway Labor Act and admitting to membership employees in any of the services or capacities covered by the First Division of the National Railroad Adjustment Board. Judge Herlands traced the legislative history of the statutory provision and concluded that the statutory language and its legislative history left little interpretative flexibility and that "absent specific direction by Congress it would be most imprudent for the federal courts to reach out and create another approach to the problem of intercraft mobility and thereby assume the role of referee in inter-union power struggles. See, *Pennsylvania R. Co.* v. *Rychlik,* 352 U.S. 480, 496 (1957)."

Subsequent to the issuance of the preliminary injunction the intervenor-plaintiff Order of Railway Conductors and Brakemen, and its members, became parties and the preliminary injunction was extended to protect its employees from having to join or maintain membership in the defendant Brotherhood so long as they maintained membership in either the Switchmen's Union or the Order of Railway Conductors.

Opinion by Palmieri, D.J.

The positions of the plaintiffs and the intervenor-plaintiffs with respect to the motions for summary judgment are identical, both asserting the right to protect by appropriate provisions of the railroad's union shop agreement their right to the alternate union membership privilege granted by Section 2, Eleventh (c) of the Railway Labor Act.

This Court accepts and adopts as valid the conclusion that Section 2, Eleventh (c) of the Railway Labor Act was violated by the union shop agreement in question. The contract between the Erie and the Brotherhood fails on its face to recognize the right of the employee to alternate union membership. This is tantamount to a threat to the employee that he will lose his job unless he complies with the language as written. See, *NLRB* v. *Gottfried Baking Co.*, 210 F.2d 772, 779-780 (2d Cir. 1954); *Red Star Express Lines* v. *NLRB*, 196 F.2d 78, 81 (2d Cir. 1952); *NLRB* v. *Local No. 2 Plumbers*, 360 F.2d 428, 435 (2d Cir. 1966). The arguments of the Brotherhood to the contrary are unpersuasive. Prior to the contract in question, and ever since the 1951 enactment of the alternate membership provision, it appears to have been a uniform practice of the Brotherhood and of all operating unions to write the language of Section 2, Eleventh (c), into their contracts as an exception to the requirement of membership.[3] In any event the reserved intentions or asserted policies of the Brotherhood cannot change the impact of its invalid agreement. There is no basis for indulging in any presumption that the defendants intend to recognize the employees' right to alternate union membership as a means of satisfying the union

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[3] David Levinson, *Union Shop Under the Railway Labor Act*, 6 Lab. Law Journal, 441, 444 (July 1955):

"Terms corresponding to this clause are found, of course, in every lawful union shop agreement covering the operating crafts."

shop obligation. Nor would it be proper to permit the employees to be caught in a maze of legal subtleties by the equivocal stance the Brotherhood takes in this litigation. Indeed its insistence before this Court that employees have no right to alternate union membership as a means of satisfying the union shop obligation but must join the Brotherhood negates any intention to recognize the validity of Section 2, Eleventh (c), of the Railway Labor Act. The deliberate omission of any reference to this crucial statutory provision in the railroad's union shop agreement with the Brotherhood gave the employees no choice except to seek enforcement of their rights by legal means.

The plaintiffs concede that the resolution of their original claim for damages has become moot in view of the issuance of the temporary injunction. The defendants' counterclaim for damages could become an issue only if the contract complained of were held to be valid as a matter of law. Since the issue of the invalidity of the contract clause complained of must be decided in favor of the plaintiffs, the counterclaim for damages must of necessity be dismissed.

The motion of plaintiffs and intervenor-plaintiffs for summary judgment is granted. The motion of defendants for summary judgment is denied.

Submit order on notice consonant herewith.

Dated: New York, N. Y.
July 25, 1967

EDMUND L. PALMIERI
U.S.D.J.

APPENDIX "C"

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 244—September Term, 1967.

(Argued January 3, 1968 Decided March 5, 1968.)

Docket No. 31809

JOHN P. O'CONNELL, R. A. GALLO and CHARLES DOYLE, etc., *et al.*,

Plaintiffs-Appellees,

WAYNE W. DELANEY, DORRENCE E. NEU, GLEN L. THOMPSON and JOHN A. BISH, etc., *et al.*,

Intervenors-Plaintiffs-Appellees,

—v.—

ERIE LACKAWANNA RAILROAD COMPANY, a corporation,

Defendant,

—and—

BROTHERHOOD OF RAILROAD TRAINMEN, an Unincorporated Association, *et al.*,

Defendants-Appellants.

Before:

LUMBARD, *Chief Judge,*
MOORE and FRIENDLY, *Circuit Judges.*

Appeal from an order of the District Court for the Southern District of New York, Edmund L. Palmieri, *J.*,

granting plaintiff's motion for summary judgment in an action for damages, injunctive relief and a declaratory judgment that two union shop agreements between the Brotherhood of Railroad Trainmen and Erie Lackawanna Railroad Company which did not provide that membership in any union national in scope and organized in accordance with the Railway Labor Act and admitting to membership employees of a craft or class in an operating service satisfies the union shop agreement violated Section 2, Eleventh of the Railway Labor Act, 45 U. S. C. 152, Eleventh.

Affirmed.

LEE LEIBIK, 343 South Dearborn Street, Chicago, Illinois (Ruth Weyand, 343 South Dearborn Street, Chicago, Illinois, on the brief), *for plaintiffs-appellees and intervenors-plaintiffs-appellees.*

ARNOLD B. ELKIND, 122 East 42nd Street, New York, New York, *for defendants-appellants.*

LUMBARD, *Chief Judge*:

Defendants appeal from a judgment which found strict union shop clauses in a railroad collective bargaining agreement void and enjoined the appellants from requiring membership in the appellant union as a condition of continued employment. Appellees successfully argued on motion for preliminary injunction before Judge Herlands, 268 F. Supp. 397 (SDNY 1967), and on motion for summary judgment and a permanent injunction before Judge Palmieri, that the union shop clause appellant negotiated with the railroad violates the clear language of Section 2, Eleventh of the Railway Labor Act, 45 U. S. C. 152,

Eleventh, and that the union and railroad could not lawfully condition employment upon membership in appellant union even though the union is the sole bargaining agent for all of the railroad's employees. Jurisdiction is based upon 28 U. S. C. §1337 and the Declaratory Judgment Act, 28 U. S. C. §2201.

Appellant concedes that if the words of Section 2, Eleventh of the Railway Labor Act are given their natural meaning, the agreement is invalid.[1] However, it asks the

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1 Section 2

"Eleventh. Notwithstanding any other provisions of this Act, or of any other statute of law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organization duly designated and authorized to represent employees in accordance with the requirements of this act shall be permitted—

"(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class; * * *

"(c) The requirement of membership in a labor organization in an agreement made pursuant to sub-paragraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of Subsection (h) of Section 153 of this chapter, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter, and admitting to membership employees of a craft or class in any of said services; * * * PROVIDED, HOWEVER, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him. PROVIDED, FURTHER, that nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services."

court to avoid "the melancholy irrationalism of interpreting subsection (c) literally." We agree with Judge Herlands that there is no compelling indication of legislative intent contrary to the clear words of the statute, nor are the results of construing the words as they were written so absurd as to require the strained construction for which appellant contends. We affirm.

The suit was brought by the Switchmen's Union of North America, AFL-CIO, and three yard service employees of the Erie Lackawanna Railroad Company on behalf of the more than 500 members of the Switchmen's Union employed by the Erie Lackawanna against defendant-appellant Brotherhood of Railway Trainmen and Erie Lackawanna.

Prior to the merger of the Delaware, Lackawanna & Western R.R. Co. and the Erie Railroad in 1960, plaintiff Switchmen's Union had been the recognized bargaining representative of the yard foremen, helpers and switchtenders employed by the Lackawanna Railroad. Appellant Brotherhood represented these same crafts and classes on the Erie Railroad.

Following enactment of the Union Shop Amendment to the Railway Labor Act in January 1951, both unions entered union shop contracts with the railroads with which they had collective bargaining agreements. They incorporated into the contracts the language of Section 2, Eleventh of the Railway Labor Act as amended, 45 U. S. C. 152, Eleventh (1964), and construed the union shop provisions so that membership in either Switchmen's Union or Order of Railway Conductors satisfied the membership requirements of the Brotherhood's contract and membership in the Brotherhood satisfied the membership and requirement of the Switchmen's contract.

When the two railroads merged in 1960, the National Mediation Board conducted an election among all the yard

service employees of the merged railroads. The Brotherhood won from the Switchmen's Union by 43 votes out of a total of 1943 votes cast. In a representation election in November 1967 the Brotherhood received 941 votes to the Switchmen's Union's 695. From 1960 until March 1967, appellant Union and defendant railroad construed and applied the union shop provisions of the contract so that membership in either the Switchmen's Union or Order of Railway Conductors satisfied the membership requirement.

On March 14, 1967 the Erie Lackawanna and appellant entered a collective bargaining agreement which provided:

> "It is agreed, as a condition of continued employment, that within sixty calendar days following the beginning of such employment, all conductors, ticket collectors, baggagemen, and trainmen of the Erie Lackawanna Railroad Company, former DL&W District, yard service employees engaged in yard service in the New York Terminal Yards . . . represented by the Brotherhood of Railroad Trainmen (Eastern District) shall become and remain members of the said Brotherhood: Provided, that this agreement shall not require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership has been denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership in the Brotherhood of Railroad Trainmen."

On April 4, 1967 the same parties entered a similar contract with respect to employees on the Erie District requir-

ing them to become and remain members of appellant union as a condition of continued employment.

In granting a preliminary injunction against enforcement of this union shop provision, Judge Herlands found that the union shop agreements entered in 1967 violated the Railway Labor Act because they failed to permit employees to satisfy the membership requirements of the contract through membership in any union national in scope admitting to membership employees within the crafts or classes covered by the First Division of the National Railroad Adjustment Board. 268 F. Supp. 397 (S D N Y 1967). After the preliminary injunction was granted, the Order of Railway Conductors and Brakemen and four of its members suing on behalf of the more than 225 members of the Order employed by the Erie Lackawanna were granted leave to intervene. On July 25, 1967, Judge Palmieri granted plaintiffs' motion for summary judgment and subsequently issued a permanent injunction. He denied defendants' cross-motion for summary judgment and entered judgment for plaintiff on appellant's counterclaim.

We believe that the legislative history of the section shows that it was meant to permit membership in any union national in scope admitting to membership employees within the crafts or classes covered by the First Division of the National Railroad Adjustment Board to satisfy the union shop requirement of a contract pursuant to section 2, Eleventh of the Railway Labor Act.

The Seventh Circuit recently has reached the same conclusion, *Berkholz* v. *Dirks*, —— F. 2d —— (7th Cir. Feb. 12, 1968).

In 1934 the railway unions agreed to amendments to the Railway Labor Act which prohibited all union shop agreements in order to reduce the strength of company unions.

S. Rep. No. 2262, 81st Cong., 2d Sess., pp. 2-3 (1950); Hearings on H. R. 7789 before Committee on Interstate and Foreign Commerce, 81st Cong., 2d Sess., pp. 3-4, 7-8, 16-17 (1950). See *Pennsylvania R. Co.* v. *Rychlik*, 352 U. S. 480, 489 (1957). By 1950, with the virtual elimination of company unions, the situation had changed so that twenty-one railway labor organizations, acting through the Railway Labor Executives Association, sponsored a bill to permit railway unions to enter union shop agreements similar to those authorized under the National Labor Relations Act, 29 U. S. C. §§157, 158.

The bill which was originally introduced, S. 3295, 81st Cong., 2d Sess., H. R. 7789, 81st Cong., 2d Sess. (1950), contained only one limitation: that the contracting labor organization must not deny any employee membership or expel him because of membership in any other labor organization. George M. Harrison, spokesman for the Association, testified that the reason for the provision was to permit an employee to retain membership in the union representing the craft or class in which he was mainly employed after temporary promotion or demotion to a different craft or class. He said:

> "Unlike most collective-bargaining representatives in outside industry, there are those in the railroad industry which recognize and protect the rights of employees who, because of the nature of their work, move back and forth across craft or class lines, and consequently move from the rules and working conditions of one collective-bargaining agreement to another. Good examples are those employees in the firemen's craft or class and those in the engineers' craft or class. The ordinary line of promotion for a fireman is to the position of engineer, and in a reduction of forces the

engineer returns to a fireman's position. These two crafts or classes usually are represented by different organizations. Conceivably, either the firemen's or engineers' organizations, or any other organization concerned with the movement of employees back and forth from one craft or class to another, could deny membership to employees who are members of another labor organization, and under a union-shop agreement endeavor to compel a carrier to discharge an employee whom the union would not accept because of his membership in another union.

"[I]t was deemed advisable to make this restriction absolutely clear so that employment could not be denied because a union refused to accept an employee into membership because he belonged to another union. That is the purpose of the phrase on lines 14 and 15 of page 2."

Hearings on S. 3295 Before a Subcomm. of the Comm. on Labor and Public Welfare, 81st Cong., 2d Sess., 18-19. See also Hearings on H. R. 7789 before the Comm. on Interstate and Foreign Commerce, 81st Cong., 2d Sess., 13.

However, this wording still created a problem for the railroad operating unions and they opposed the bill because it would have permitted a union to demand that employees working in the craft or class which the union represented belong to the union which was their bargaining representative as well as to the union to which they already belonged. As Mr. Justice Harlan said in *Penn. RR* v. *Rychlik*, 352 U. S. 480, 490 (1957):

"[T]he hearings on the bill revealed a problem, peculiar to the railroad industry, in establishing the union shop. Labor in this industry is organized largely on craft

rather than industrial lines. Engineers, firemen, trainmen, switchmen, brakemen, and conductors, for example, each are separately organized for the purposes of bargaining. And normally different unions represent different crafts; thus, on the same railroad, firemen might be represented by the Brotherhood of Firemen and Enginemen, and engineers by the Brotherhood of Locomotive Engineers. Yet seasonal and other factors produce a high degree of job mobility for individual employees in the industry, that is, of shuttling back and forth between crafts. For example, a fireman may be temporarily promoted to engineer for a short time, or a conductor might have to serve temporarily as brakeman. Under the ordinary union-shop contract, such a change from craft to craft, even though temporary, would mean that the employee would either have to belong to two unions—one representing each of the crafts—or would have to shuttle between unions as he shuttles between jobs. The former alternative would, of course, be expensive and sometimes impossible, while the latter would be complicated and might mean loss of seniority and union benefits."

Defendant Trainmen's Union proposed an amendment to the bill to provide for inter-craft mobility without dual-unionism:

"provided that when two or more crafts or classes closely related as respects the work performed by each and employment rights in more than one of them are held by the same employee, or promotions from one of such crafts or classes to another are had, the requirement for membership shall be satisfied by membership in the organization of the employee's choice, which is

> the duly designated or recognized craft or class representative of any one of them."

Hearings on S. 3295 at 68-69; Hearings on H. R. 7789 at 32-33. Rejection of appellant's proposal and later adoption of the different language contained in Section 2 Eleventh (c) is a strong indication that Congress did not intend the result which appellant urges upon us.

While the bill was reported to both the Senate and the House without any provision for inter-craft mobility, S. Rep. No. 2262, 81st Cong., 2d Sess. (1951), H. R. Rep. No. 2811, 81st Cong., 2d Sess. (1951), members of the committees which had considered the bills met with representatives of the Railway Labor Executives' Association and the American Federation of Labor and agreed that when the bills were presented on the floor the committees would also offer an amendment stating,

"*Provided further,* that no such agreement shall require membership in more than one labor organization;" 96 Cong. Rec. 15735 (Senate 1950); 96 Cong. Rec. 17052 (House 1951).

In presenting this amendment to the Senate, Senator Hill stated,

> "An employee could belong to as many different unions as he wished to belong to. But he cannot be required to belong to one. If he belongs to one, he meets the provisions of the statute, and he cannot be required to pay dues to or to belong to more than one union."

96 Cong. Rec. 15738. Four of the operating unions, including the Brotherhood of Railway Trainmen and the Order of Railway Conductors, opposed the bill as amended. The Switchmen's Union supported the bill as amended. Consideration of the bill was postponed while the unions opposing

the bill were given an opportunity to agree upon an amendment. 96 Cong. Rec. 16189 (1950). Three of the four unions agreed to support the bill if amended to include the language now contained in Section 2, Eleventh (c). 96 Cong. Rec. 16261, 16330 (1950). Only the Brotherhood of Locomotive Engineers opposed adoption of the bill. Their opposition was based upon a belief that the bill would "guarantee that the young man who has served his apprenticeship as a locomotive fireman shall never be required to become a member of the Brotherhood of Locomotive Engineers." 96 Cong. Rec. 17052 (1951).

On December 7, 1950 Senators Taft and Hill offered the amendment drafted by the Brotherhood of Locomotive Firemen and Enginemen, the Order of Railway Conductors and Brotherhood of Railroad Trainmen and it was adopted by the Senate the same day. 96 Cong. Rec. 16268 (1950). Senator Holland noted that the debate over the amendment had given notice to the Senate that the amendment made membership in any union among the operating brotherhoods sufficient. 96 Cong. Rec. 16322 (1950). The Senate passed S. 3295 as amended on December 11, 96 Cong. Rec. 16378 (1950). On January 1, 1951 the House agreed to consider S. 3295 in place of H. R. 7789, a similar bill. The debate in the House makes it clear that the Representatives understood the bill to make membership in any of the unions sufficient. Representative Scott, a member of the Interstate and Foreign Commerce Committee, said, "[The bill] provides that in transportation groups such as engineers, firemen, and so forth, membership in any organization, national in scope, which accepts such employees as members shall fulfill requirements of union membership." Representative Harris, who served as spokesman for the House Committee, explained the history of the Senate amendment

and stated that it "leaves to the individual employee in the operating service the choice of operating union to which he will belong, and this specifically resolves any doubt concerning a possible requirement of dual membership." 96 Cong. Rec. 17059 (1951). And Congressman O'Hara endorsed the statement of the Brotherhood of Locomotive Engineers that the amendment would mean that an Engineer would never have to join the Engineer's Union. 96 Cong. Rec. 17052 (1951).

Nevertheless appellant argues that the Supreme Court has limited the application of the proviso to situations where both unions are bargaining agents for crafts or classes of employees on the same railroad. We do not consider the language in *Pennsylvania R.R. Co.* v. *Rychlik*, 352 U. S. 480 (1957) which appellant relies upon to be dispositive. The Court held that "Section 2, Eleventh (c) allows alternative union membership only in those unions which have already qualified under Section 3, First, of the Act, as electors of the union representatives on the National Railroad Adjustment Board, and not membership in any union which happens to be, as a matter of fact, national in scope and organized in accordance with the Railway Labor Act." 352 U. S. at 485. The issue of the scope of Eleventh (c) as applied to unions qualified under Section 3, First, of the Act was not before the Court. It only decided that membership in a union which was not so qualified did not satisfy the union shop provisions of the Act.

However, appellant points to other language at page 489 of the opinion:

> "[T]he sole aim of the provision was to protect employees from the requirement of dual unionism in an industry with high job mobility, and thus to confer on qualified craft unions the right to assure members

> employment security, even if a member should be working temporarily in a craft for which another union is the bargaining representative,"

and to a statement at pages 492 and 493 that,

> "The only purpose of Section 2, Eleventh (c) was a very narrow one: to prevent compulsory dual unionism when an employee temporarily changes crafts. The aim of the Section, which was drafted by the established unions themselves, quite evidently was not to benefit rising new unions by permitting them to recruit members among employees who are represented by another labor organization. Nor was it intended to provide employees with a general right to join unions other than the designated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility."

While the Court described the section as having only one purpose, prevention of compulsory dual unionism and provision for intercraft mobility, there are two aspects to the operation of the proviso reflecting the two situations in which intercraft mobility might lead to the dual unionism problem.

First, when an employee changes crafts his new craft may be represented by a different union. Under the statute the employee clearly does not have to change unions. The second situation in which the problem arises, which was not discussed in *Rychlik,* is when so many employees change crafts without changing unions that the bargaining agent for the craft no longer has majority membership in the craft. For example, when there are many layoffs so many engineers may be performing firemen's jobs that there are more engineers than firemen in firemen's posi-

tions. The result might be that the Brotherhood of Locomotive Engineers will get the contracts for both firemen and engineers and the Brotherhood of Locomotive Firemen and Enginemen will no longer have a contract with the railroad. In this situation the firemen may still want to be members of the Locomotive Firemen's Brotherhood which is their traditional craft union. The second aspect of the operations of Eleventh (c) is to permit these firemen, now a minority, to satisfy the union shop requirement by membership in their craft union, even though it is no longer their bargaining agent.

The annual reports of the National Mediation Board to Congress from 1934 to 1950 show that during this period there were 544 instances on 64 different railroads in which, through demotions or promotions due to changed employment conditions or through union recruiting, a minority union in a craft achieved a majority and as a result took over the contract traditionally held by another union. It was with this history in mind that the operating unions drafted the amendment to the bill which became §2, Eleventh (c). Obviously the amendment which the unions drafted was intended to make it clear that an employee would be able to satisfy union shop requirements by retaining membership in an operating union whether or not it was the collective bargaining agent for the craft or class in which he was working and whether or not it was the bargaining agent for any craft or class.

In any event, the Supreme Court noted in its opinion in the *Rychlik* case, that in deciding the case it did not reach the questions which had been decided by this Court. 352 U. S. at 485. Our opinion, remanding to the district court for a finding on whether the union which Rychlik joined was "national in scope" within the meaning of the Act, was predicated upon holding that membership in any such union

would satisfy the requirement of §152 Eleventh (c). 229 F. 2d at 171, 174 (2d Cir. 1956). We see no reason to hold otherwise. No argument has been advanced which compels overruling of our decision in *Rychlik*, as limited by the Supreme Court's holding to unions qualified under Section 3, First of the Act.

We are not persuaded by the contrary holding of the Third Circuit in *Rohrer* v. *Conemaugh & Black Lick Railroad Company*, 359 F. 2d 127 (1966), which the Seventh Circuit also has declined to follow, *Berkholz* v. *Dirks*, —— F. 2d —— (7th Cir., Feb. 12, 1968).

Further, the Supreme Court's decision in *Felter* v. *Southern Pacific Co.*, 359 U. S. 326 (1959) implies that an employee can satisfy the union shop requirement by membership in any of the recognized railroad unions for the First Division, since the Court assumed that Felter had validly changed his union membership although it was clear that he left the union which was his collective bargaining agent and it was not clear that his new union represented any of the railroad's employees.

It is true, as appellant contends, that as in the National Labor Relations Act, the purpose of the union shop is to prevent employees from being "free riders," see *International Association of Machinists* v. *Street*, 367 U. S. 739, 760-64 (1951). But we cannot say that the scheme adopted by Congress, which permits membership in any of the unions which jointly share the duty of administering the machinery of the National Railway Labor Act is inconsistent with that purpose. It is quite conceivable that Congress intended to implement its scheme through a system of reciprocal gains and losses among the various operating unions. While the Brotherhood of Railroad Trainmen does not collect dues from some of the employees of the Erie Lackawanna whom it represents, concededly it collects

dues from employees of other railroads who are represented by other operating unions. See 367 U. S. at 764 n. 15.

We are unable to find any justification for appellant's contention that it is entitled to a strict union shop despite the language of the Act because it is the sole collective bargaining agent for all employees on the railroad.

Appellant's cause of action for libel, pleaded in its answer as a counterclaim, was dismissed below because it "could become an issue only if the contract complained of were held to be valid as a matter of law." We disagree. The alleged libels described the union shop agreement as a "Slave Labor Agreement" and described membership in appellant as "Dictatorship with no voice in the affairs of their Union." No matter what the status of the union shop agreement, reference to a competing union as a "dictatorship" could constitute a libel. However, this cause of action does not arise out of the same transaction or occurrence as appellees' claim. As a permissible counterclaim it must be supported by independent jurisdictional grounds. 6 Moore, Federal Practice par. 13.19[1]. See *Lesnik* v. *Public Industrials Corporation,* 144 F. 2d 968, 975-976 (2d Cir. 1944). We find appellant's counterclaim lacking in this respect and affirm its dismissal for lack of jurisdiction over the subject matter.

The judgment is affirmed.

APPENDIX "D"

Railway Labor Act, 45 U.S.C. 152 Eleventh:

"Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and

assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section 153 of this title, defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a

member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238."